BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: J. H. M., Claimant, vs. NORTH BAY REGIONAL CENTER, Service Agency.	OAH No. 2001030199

DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Santa Rosa, California on June 19, 2001.

Barbara L. Bozman-Moss, Attorney at Law, 700 College Avenue, Santa Rosa, California 95404, represented claimant.

Nancy Ryan, Attorney at Law, represented the service agency.

The matter was submitted on June 19, 2001.

ISSUES

1. Are the proceeds from a legal settlement received by claimant a "generic resource" that must be exhausted before the service agency must pay for necessary services or equipment?

2. If the settlement is a generic resource, has it been depleted to the point that the service agency must pay for necessary services or equipment?

3. If the settlement is not a generic resource, or if it is a generic resource but has been depleted, must the service agency fund the following items requested by claimant: 1) motorized wheelchair repairs or modifications, 2) a new bed and pressure relief mattress, 3) van repairs, 4) a manual wheelchair?

FACTUAL FINDINGS

Background

1. Claimant is a 20-year-old client of the North Bay Regional Center (service agency). He was disabled from birth as a result of medical malpractice. He has cerebral palsy, seizure disorder and mild mental retardation. He is confined to a wheelchair.

2. Claimant has been a client of the service agency since 1982. In that year, the service agency funded a wheelchair and respite care for claimant. Funding for respite care continued until 1988, when the service agency learned that claimant had received a settlement in a medical malpractice suit brought on behalf of claimant and his mother as a result of the injuries that led to claimant's disability.

3. The settlement agreement, signed on March 23, 1988 by claimant's mother on her own behalf and as claimant's guardian, provided that claimant was to receive a lump sum payment of $400,000[1]; $2,500 per month for life, guaranteed for ten years, increasing at a rate of three percent compounded annually[2]; and commencing on his 21st birthday, $4,166.67 per month for life, increasing at a rate of three percent compounded annually. The settlement agreement further provided that the specified monthly amounts could be funded by purchase of annuities. In order to provide the required income streams, two separate single payment life annuities were purchased and issued in May 1988.

4. After claimant's receipt of the settlement, the service agency ceased funding of claimant's respite care in or about May 1988. In a fair hearing decision issued on November 25, 1996, it was found that respite care had ceased, not because the service agency had denied continuing services, but because of "a lack of contact by claimant's mother with the regional center" that resulted in a deactivation of claimant's case. The case was reactivated

[1] Of this amount, claimant actually received approximately $113,000. The balance was paid to his attorneys.

[2] As pointed out by the service agency, the signed settlement agreement differs from the order of the court approving the settlement. That court order indicated the $2,500 payment would increase at a rate of 10% compounded annually. Claimant asserts the 10% figure was a clerical error. For purposes of this decision, whether or not that is so is irrelevant. The annuity purchased to fund this income increases at a rate of three percent compounded annually.

in 1992 when claimant again requested funding for respite care. The service agency refused that request based upon its determination that claimant's settlement funds were an available alternative generic resource. Claimant did not appeal this denial of funding. (See Finding 6, below.)

5. In 1995, claimant again requested that the service agency fund respite care, as well as the purchase of an electric transfer lift. The service agency refused to fund either of these items, again based upon its determination that funds for these purchases were available through the proceeds of the medical malpractice settlement. Claimant appealed this denial and a fair hearing was held on October 26, 1995. In her decision issued on November 17, 1995, the administrative law judge did not specifically decide the first issue set forth in the current proceeding, i.e, whether the proceeds from the settlement constitute a "generic resource" that must be exhausted before the service agency will pay for necessary services or equipment. Rather, she resolved the dispute by finding that, after payment of claimant's monthly expenses, the monthly income from the annuity did not provide a sufficient amount to fund ongoing respite care or new equipment purchases. The service agency was ordered to fund both respite care and the purchase of an electric lift.

6. As a result of the foregoing decision, claimant requested that the service agency reimburse his estate for sums of money it had expended for respite care and equipment purchases between 1988 and 1995. This resulted in the fair hearing decision of November 25, 1996, referred to in Finding 4, above. Once more, the administrative law judge hearing the case did not decide whether the proceeds from the settlement constituted a resource that had to be exhausted before the service agency could be required to fund services and supports. This judge resolved the dispute by finding that claimant had not filed timely appeals from either the 1988 termination of respite care funding or the 1992 denial of his request for respite care and that his claim for reimbursement was thus barred as untimely.

7. Since the November 17, 1995 decision, claimant has continued to receive services and supports funded by the service agency. The service agency has funded, and continues to fund, nursing respite services, generally in amounts ranging between 100 and 138 hours per month. The service agency has also funded a weekend camp for claimant and various equipment purchases, some of which also required funding for occupational therapist services. It does not appear that at any time between October 1995 and February 2001 the service agency sought to deny services and supports to claimant on the grounds that his settlement funds constituted a "generic resource" that first had to be exhausted.

Current Requests

8. At some time not established by the evidence, but apparently in late 2000 or early 2001, claimant requested that the service agency fund the following items: 1) repairs or

modifications to his motorized wheelchair, 2) a pressure relief mattress[3], 3) van repairs, and 4) a manual wheelchair.

9. In November 2000, Sue Hirsch, who has been claimant's client program coordinator since August 1999, sought more information from claimant and his mother regarding the settlement claimant had received. Hirsch wrote:

> There has been a great deal of confusion over the years regarding the settlement [claimant] received. As you know, by law, NBRC is required to be the payer of last resort. That means that legally, we cannot purchase services or equipment for our clients if there is another "generic resource" available to make those purchases. However, NBRC does not consider an individual's income or personal wealth when making decisions regarding purchases.
>
> The reason there has been so much confusion over the years is that the nature and purpose of [claimant's] settlement is unclear to us. We have not been able to determine if the settlement should be regarded as personal income or as a generic resource. If we can determine, once and for all, the nature and purpose of the settlement, we can proceed consistently in the future. . . .

Hirsch requested that claimant and his mother provide a copy of the settlement agreement to the service agency for review.

10. Claimant's mother provided the settlement documents to the service agency.[4] Thereafter, on February 6, 2001, the service agency issued a Notice of Proposed Action denying funding for the items listed in Finding 8. As set forth in that notice and an accompanying letter from Hirsch, the service agency determined that, "based on the wording in the settlement," the "settlement constitutes a generic resource" that must be exhausted before the service agency will pay for services. Claimant filed a Fair Hearing Request challenging the service agency's action on March 7, 2001.

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[3] At the hearing, it became apparent that claimant was also requesting a new hospital bed in conjunction with the mattress. Although it is unclear whether the request for a new bed was made prior to the Notice of Proposed Action and Fair Hearing Request filed in this case, the service agency does not object to the hospital bed being considered as part of this hearing.

[4] The settlement is covered by a confidentiality agreement. Although claimant's mother revealed the contents of the agreement to the service agency, it remains confidential. Accordingly, while the settlement agreement (service agency's Exhibit 2) and underlying court order approving the settlement (Exhibit 1) were received in evidence, both have been placed under seal. Claimant's Exhibit G, which contains privileged communications between the service agency and its attorney, and which was not received in evidence, was also placed under seal.

11. The service agency's denial of funding was based, in part, upon its Procedure Memos 2301—Requests for Purchase of Service, and 2401—Use of Existing Public and Private Resources to Pay for Client Services, both of which have been approved by the Department of Developmental Services. Procedure Memo 2301 provides, in relevant part: "Regional Center funds will not be expended for services available through other sources (W & I 4659). This includes not only public funds but also available personal resources (for example, large settlements ruled to be for the care of the client)." Welfare and Institutions Code section 4659, referenced in Procedure Memo 2301 and set forth below in Legal Conclusion 1, provides that regional centers "shall identify and pursue all possible sources of funding for consumers receiving regional center services."

Procedure Memo 2401 is intended to provide guidelines for the interpretation and implementation of some of the provisions of both Procedure Memo 2301 and Welfare and Institutions Code section 4659. In relevant part, Procedure Memo 2401 provides as follows:

> C. **LEGAL SETTLEMENTS:** When a request for purchase of services is received from a client or his legally designated representative and it is determined that a trust account or another source of income exists from a legal settlement, the following procedure shall be followed:
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> 1. The client or legal representative shall be requested to furnish a copy of the trust agreement or other legal documentation for the client's file.
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> 2. The Director, Client Services, or designee, with legal consultation, if needed, will review the trust or other documentation to determine whether the requested service should be covered by the trust.
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> 3. If the Director, Client Services determines that the services should be covered by the alternate source, the Client Program Coordinator will follow procedures to deny the request. . . .

12. Neither the settlement agreement nor the court order approving it expressly provide that the proceeds of the settlement are for the purpose of meeting claimant's needs. Nevertheless, in accordance with Procedure Memos 2301 and 2401, the Director of Client Services determined that the purpose of the settlement claimant had received was to provide for his needs and that, therefore, it was an "available personal resource" that had to be

exhausted before the service agency would purchase services on claimant's behalf. A legal settlement stemming from a lawsuit related to a client's disability and which is designed to meet his or her needs is the only kind of settlement the service agency will treat as such an "available personal resource."

Claimant's Budget

13. Claimant's court-appointed conservator handles his finances. The conservator is responsible for paying claimant's monthly expenses out of his monthly income. Claimant's annuity currently produces income of about $3,500 per month. His monthly expenses approximate that amount. For the most recent fiscal year (ending March 31, 2001) claimant had income of $41,526.96 and expenses of $44,900.06. Because of a small reserve carried over from the previous year, claimant did not have to operate at a deficit. However, he continues to carry-over a long-term debt of $8,480. This debt dates back to 1993 and relates to attorney fees and medical costs. Claimant cannot qualify for Medi-Cal because of his income, and he cannot qualify for private health insurance because of his pre-existing condition. As a result, all medical expenses must be paid from his monthly income. (The lump sum payment he received when the settlement was first approved was used to purchase a home and van.) Claimant is facing the possibility of hip surgery, which will entail a large medical expense unless he can qualify for some alternative funding.

14. The evidence is clear that even if claimant's settlement funds are considered an alternative resource that must be exhausted before the service agency will purchase services on his behalf, at the present time the income from that settlement is barely sufficient to meet claimant's ongoing needs. No funds would be available to pay for the additional services claimant has requested the service agency to fund.

Findings on Specific Requests

Wheelchair Repairs/Modifications

15. In claimant's April 9, 1998 Individual Program Plan (IPP) it was noted that claimant's motorized wheelchair did not hold him in the correct position, resulting in his getting sores from the hip bar. In a November 6, 1998 addendum, it was noted that claimant's mother said claimant had outgrown his wheelchair and needed a new one. As a result, the service agency authorized an occupational therapy evaluation by Linda Molinari to determine claimant's needs. Molinari noted that claimant's existing motorized wheelchair was only "moderately effective in maintaining him in a comfortable, functional position." He tended to slide forward in the chair, which required frequent repositioning by his mother. He was experiencing recurring skin breakdown on his coccyx. Molinari recommended that claimant receive a new "Action Storm power wheelchair with power tilt seat" and a "Deep contour Jay cushion and seat back" composed of foam with gel placed over the areas that were susceptible to skin breakdown. These features would increase claimant's pelvic

stability/positioning and comfort and would allow him to independently relieve pressure on his coccyx, thus decreasing both the need for someone to reposition him and the potential for skin breakdown.

16. Three bids were obtained for a new chair based on the recommendations outlined by Molinari. Hometech Medical Supplies supplied a bid of $10,700 for an Action Ranger X chair with a Tarsys basic power tilt system. Rehab Mobility Services supplied a bid of $10,815.30 for an Action Storm with a Tiltmaster TK tilt system and a Jay deep contour back and cushion. Western Rehab, which had built claimant's then-existing chair, supplied a bid of $13,198.50 for an Action Storm with a Tiltmaster CG tilt system and a Jay deep contour seating system with pressure relief cushion. The bids were reviewed by Molinari, who believed the Rehab Mobility and Western Rehab bids were for the same chair, similarly equipped. Although claimant's mother preferred the Western Rehab bid because she had worked with the company before, the service agency authorized purchase of the chair from Rehab Mobility Services as the most cost-effective bid.

17. Claimant received his new chair from Rehab Mobility in early April 1999. Since that time, claimant's mother has repeatedly brought the chair back to the vendor for repairs and adjustments. The chair was in the shop for repairs or adjustments at least 15 times between April 9, 1999 and May 12, 2000. A number of these visits were related to the speed control, which has caused claimant a great deal of difficulty. While he was quite proficient in driving his former chair, he has difficulty maneuvering and controlling the new one. Claimant has also continued to experience some of the same problems he had with his old chair—the seat does not hold him in position and he tends to slide forward; he continues to get pressure sores on his buttocks and hips. The family has had to put padding under the seat belt to help prevent sores because the belt is too tight.

Claimant's mother admits that Rehab Mobility did not have full opportunity to fit the chair to claimant when she picked it. She asserts that this was because her son had waited some time for the new chair and was excited about getting it. When they arrived to pick it up, the center abductor pommel was not installed, and the footrests were too small. Claimant's mother testified that, rather than wait the several weeks Rehab Mobility said it would take to order these items, she chose to take the chair and install on it herself the center pommel and foot rests from her son's old chair. (It is noted that in Molinari's recommendation she had specifically said that the pommel from the existing chair could be reused.) Shortly after delivery, the service agency authorized various modifications to the chair, including a flip-down, medial-support pommel. Rehab Mobility took measurements for this item in July 1999 but apparently never had the opportunity to install it.

18. As a result of claimant's mother's complaints about the wheelchair, in September 1999 the service agency authorized an evaluation of the chair by occupational therapist Michael Hinsdale. He found numerous problems with the chair, including a nonfunctional safety lockout that allowed the chair to be driven while fully reclined, poor routing of wiring, no lap tray, a poorly attached abductor pommel, leg rests that are loose and

difficult to keep adjusted for height, an incorrectly adjusted four-point seat belt (which had created a small area of breakdown on claimant's back), a torn bushing on the right pedestal stop that caused a slightly uneven sitting position, a foot position that is too far forward on the foot plates, and front casters that hit the foot plates during turns. Finally, Hinsdale found that the "joystick control is a Mark IV Rx vs. the Mark IV A series, which would have made it possible to correctly program his chair and controls to make him independent to activate and use his computer."

19. Rehab Mobility provided a point-by-point response to Hinsdale's concerns, disputing a number of them, attributing some to modifications made by the family, and agreeing to correct a number of items.

20. In April 2000, at the request of claimant's mother, physical therapist Kathy Leone of California Children Services (CCS) did another assessment of claimant's wheelchair. Leone found problems with the chair in three areas. One of those areas related to the electronics, joystick and drivability; the other to positioning for comfort and function. As to the first issue, Leone wrote that claimant "should be driving this chair as well as the previous one. Instead it is harder to control and jerky and by report, the computer adjustments will not stay adjusted. The chair is driveable in full tilt and the switch to activate the tilt is inappropriately located. . . . The problems with the electronics must be referred back to the manufacturer if they cannot be satisfactorily adjusted by the vendor." As to the second issue, Leone wrote:

> Secondly, [claimant] has a strong extensor posturing with limited hip flexion as well as extension. He is chronically sacral sitting. He also tends to slide his pelvis towards the right, leaning his trunk and head to the left. This has been a major positioning problem and [claimant] is more comfortable when his pelvis is held securely. The current Jay seat does not keep him out of sacral sitting nor keep him in the midline. I would recommend a custom antithrust seat with hip guides.

21. In attempting to resolve the problems with claimant's wheelchair, Hirsch and her then-supervisor, Richard Ruge, spoke with both Rehab Mobility and Mark Hawkins of Western Rehab. They then learned for the first time that there had been an "error in process." While Hirsch, depending upon Molinari's advice, had believed the bids provided by Rehab Mobility and Western Rehab were for the identical chair, the service agency now learned this was not the case. In particular, the Tiltmaster TK tilt system in the Rehab Mobility bid is not the same as the Tiltmaster CG tilt system in the Western Rehab bid. The latter is a more complex, and more expensive, "center of gravity" seating system. Hawkins, who had built claimant's previous wheelchair and had worked with the family for years,

told the service agency that claimant needed a very specialized chair in order to seat him properly. This would include a center of gravity seating system rather than a more standard tilt system.

22. Western Rehab has provided a bid for modifying claimant's existing wheelchair to include, among other things, a center of gravity seating system, new footrests, lateral thoracic supports, lateral hip guides and a flip-down abductor at a cost of $8,047.79. This bid serves as the basis of the request claimant made for repairs and modifications to his wheelchair. For its part, Rehab Mobility stands ready to "make the chair right." They believe it requires only fitting adjustments, similar to the ones that have already been done without charge.

23. In September 2000, an orthopedic and occupational therapy evaluation of claimant's wheelchair was done at the CCS Medical Therapy Unit of the Sonoma County Department of Health Services. A physician there prescribed the following modifications for claimant's wheelchair:

1. new custom molded antithrust seat with pressure relief foam and seat depth cut-out
2. complete reapplication of hip abductor, head rest and 4 point padded belt
3. thigh guide
4. adjust mounting brackets for Jay back
5. Ottobock arm support
6. plexiglas tray for arm rest and computer
7. correct electronic difficulties
8. joystick with built in control for tilt
9. secure multiple wires out of way
10. supportive headrest

24. The evidence is clear that claimant's wheelchair needs, at the least, significant modifications in order to provide claimant the proper seating position and to ensure his safety while driving. Occupational therapist Michael Hinsdale, physical therapist Kathy Leone, Mark Hawkins of Western Rehab and an occupational therapist and physician at the CCS Medical Therapy Unit all have recommended various modifications and corrections. It is unclear whether the "antithrust seat" recommended by Leone and the CCS physician differs from the center of gravity seating system recommended by Hawkins. What is clear is that the current seating system does not serve claimant properly and should be replaced. But the extent of modifications, and the specific modifications required, cannot be decided based upon the record presented. And while it is possible some of the problems with the chair relate to modifications the family made on its own, it is apparent that the primary cause of the problems claimant has experienced with the chair relate to the chair's basic design and construction.

Hospital Bed and Pressure Relief Mattress

25. The service agency purchased a bed and mattress for claimant in 1996, when he was approximately 14 years old. Claimant has now outgrown the bed—he is as tall as the bed is long and he has been falling out of it because of its narrow width. Because claimant has had ongoing problems with pressure sores, his physician has prescribed for him a pressure relief mattress. As indicated in footnote 3, above, while claimant's request was simply for the mattress, that has now been expanded to include a hospital bed on which to place the mattress.

26. Sue Hirsch, claimant's client program coordinator, testified that claimant's request was denied for two reasons—the legal settlement and the fact that the service agency does not fund items a family would normally provide for its children, such as when they need a larger bed. In closing argument, however, the service agency indicated that, since the pressure relief mattress was prescribed by a physician, it would fund a hospital bed and mattress to the extent this exceeded the cost of an ordinary bed and mattress. Claimant agrees that it would be appropriate for him to pay the cost of a standard bed and mattress and for the service agency to pay for the additional cost of the specialized bed and mattress.

Van Repairs

27. In February 1999, the service agency funded the replacement of the wheelchair lift on claimant's van. The existing lift was broken and replacement parts were not available. The lift was installed by Access Development.

28. After claimant received his new wheelchair in April 1999, his mother complained that her son was having trouble entering the van because of the size of the chair. He was hitting his head on the top of the doorway and was scraping his knuckles because of the narrowness of the lift. In order to solve at least one of these problems, in May 1999 the service agency funded installation of a three-inch raised "eyebrow" on the van roof and doors. Access Development performed the installation. Painting the van, omitted at the time of the eyebrow installation, was done sometime later. Although the service agency authorized funding to Access Development for the painting, it is unclear if the painting was done by Access or some other entity.

29. Claimant's mother has complained to Hirsch that the van doors have not been closing properly because the headliner at the eyebrow was not installed correctly. In addition, she complained that the van roof had been damaged during the painting when someone stepped or kneeled on it, causing ripples. Hirsch understood that these were the two items claimant was requesting be repaired. Consequently, these were the items that were denied in the February 6, 2001 Notice of Proposed Action. At the hearing, however, claimant's mother testified that she is not seeking correction of the roof problem. She is now requesting that a new lift be installed because the existing lift is too narrow for her son's wheelchair and he continues to scrape his knuckles on the side; that the eyebrow somehow

be redone to afford her son more headroom since he continues to hit his head; and that the doors be fixed to close properly. In this regard, she said the doors do not fully close because of a weather-stripping problem, allowing exhaust fumes to enter the vehicle; and that the bottom latch on the doors does not work, so that she almost has to tie the doors closed.

30. The doors on the van clearly need to be repaired. It appears that the improperly/insecurely closing doors are related to the installation of the eyebrow and should therefore be addressed by Access Development. Claimant's requests for reconfiguring the eyebrow and installing a new wheelchair lift have not yet been evaluated and considered by the service agency. It is willing to make a decision on these items once a determination has been made whether or not claimant's legal settlement is available to pay for services and equipment.

Manual Wheelchair

31. Claimant has requested that the service agency fund for him a manual wheelchair. Claimant would like this chair to serve as a back-up when his motorized wheelchair is being repaired and to allow him to go places his larger motorized chair will not permit him to go. On this latter point, claimant's mother testified that the motorized chair weighs about 300 pounds and is therefore difficult to carry up and down stairs. She recently had difficulty getting her son into Easter services at church because there was no ramp access. A number of people had to help her carry the chair up some stairs. A manual chair would weigh only about 100 pounds and would therefore be easier to use in this kind of situation. In another instance, when their van broke down, she and her son had to find their own way home since his motorized chair would not fit in the tow truck. A manual chair that could be folded would have allowed her and claimant to have gotten a ride in the tow truck.

32. Claimant has submitted a bid from Western Rehab for $3,723.50 for a manual chair that includes some of the custom seating items necessary to properly position claimant in the chair.

33. The service agency denied this request because of the legal settlement, because the bid by Western Rehab was deemed not to be cost-effective, and because the service agency generally does not provide back-up wheelchairs. In this regard, the service agency points out that, for times when claimant's motorized chair is being repaired, he could rent a manual wheelchair or get a loaner from the repairing vendor. The service agency views a back-up wheelchair as "a convenience not a necessity," and that would not be cost-effective. The service agency points out it has a limited budget that will generally not enable it to purchase items that might be helpful but not necessary. It is concerned about where to draw the line on back-up items and worries about setting a bad precedent in providing equipment to be used "just in case." Doing that, it is argued, might lead to someone requesting a back-up van in case his or her vehicle has to be repaired. In response to the service agency's position regarding a rental or loaner chair, claimant points out that he has special seating needs, needs that generally will not be met except in a chair customized to fit him.

LEGAL CONCLUSIONS

Are the proceeds from a legal settlement received by claimant a "generic resource" that must be exhausted before the service agency will pay for necessary services or equipment?

1. In denying claimant's request for services and equipment, the service agency concluded that the settlement claimant had received constituted a "generic resource." In support of that conclusion, the service agency relies largely upon Welfare and Institutions Code section 4659.[5] It provides:

> (a) Except as otherwise provided in subdivision (b) or (c), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:
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> (1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.
>
> (2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.
>
> (b) Any revenues collected by a regional center pursuant to this section shall be applied against the cost of services prior to use of regional center funds for those services. . . .
>
> (c) This section shall not be construed to impose any additional liability on the parents of children with developmental disabilities, or to restrict eligibility for, or deny services to, any individual who qualifies for regional center services but is unable to pay.
> . . .

It is the service agency's position that claimant's legal settlement falls within subdivision (a)(2) of section 4659. The agency argues that, because the settlement was designed to compensate claimant for the injuries that resulted in his developmental

[5] Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

disabilities and take care of his needs, the settlement is to be treated much like an insurance policy. Therefore, to the extent it is an available resource to meet claimant's needs, it must be tapped before the service agency will provide services to claimant.

2. The service agency's contention cannot be accepted. The California Supreme Court has held that the Lanterman Act (Act) is an entitlement act.[6] Regional centers must therefore provide services to eligible consumers regardless of their, or their parents', financial status.[7] But the obligations of the state and the regional centers under the Act are not open-ended and without restriction. The most basic restriction, as set forth by the Supreme Court in *Association of Retarded Citizens*, is that developmentally disabled persons are entitled to receive at state expense "only such services as are consistent with [the Act's] purpose."[8] Other restrictions on the scope of the Act's entitlements are those specifically imposed by statute. As the court held in *Clemente* v. *Amundson*, "The state has accepted its obligation to pay for support services . . . regardless of the parents' financial status as a statutory entitlement—*unless the Legislature has created an exception to that policy*."[9] [Emphasis added.]

3. In *Clemente*, the court was called upon to decide whether a regional center could impose a parental copayment for respite services. In section 4685(c)(6), the Legislature had imposed a parental copayment for day care services. The regional center argued that it could also impose a copayment for respite services because child care was a component of both day care and respite services. In rejecting this argument, the court pointed out that, in the listing of the types of assistance available through regional centers in section 4685(c)(1), day care and respite care were listed separately. This was important because "section 4685 identifies respite and day care as separate type of assistance available to families caring for developmentally disabled children at home but expressly authorizes parental copayment *only* for day care. Had the Legislature intended to assess a copayment for respite services it had every opportunity to do so in the 1992 amendment which added copayment for day care."[10] [Emphasis in original.] In furtherance of this point the court noted a number of other statutory provisions in which the Legislature had specifically limited entitlements under the Act. And the court rejected the regional center's argument that the directive of section 4791(c)(1) that regional centers seek "alternative sources of payment for

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[6] *Association for Retarded Citizens* v. *Department of Developmental Services* (1985) 38 Cal.3d 384.

[7] *Clemente* v. *Amundson* (1998) 60 Cal.App.4th 1094, 1103.

[8] *Association for Retarded Citizens* v. *Department of Developmental Services, supra,* 38 Cal.3d at p. 393.

[9] *Clemente* v. *Amundson, supra,* 60 Cal.App.4th at p. 1103.

[10] *Id.*, at p. 1105.

services" provided a basis for the copayment requirement. The "vague language" of this subdivision, it held, could not be read to authorize copayment for respite services.[11]

4. In sum, in holding that the regional center could not impose a copayment for respite services, the *Clemente* court established the principle that the Act's entitlements could not be limited "in the absence of express statutory authority."[12] Here, there is no express statutory authority that permits the service agency to consider claimant's settlement as an available resource that must be exhausted before the service agency will provide him the services and supports he has requested.[13]

5. The service agency has categorized claimant's settlement as a "generic resource." Subdivision (d) of section 4659 uses, but does not define, the term "generic resources." Nor is that term defined elsewhere in either the Act or in the Department of Developmental Services' regulations. The Act defines "generic agency" as "any agency which has a legal responsibility to serve all members of the general public and which is receiving public funds for providing such services."[14] The regulations define "generic support(s)" as "voluntary service organizations, commercial business, non-profit organizations, generic agencies, and similar entities in the community whose services and products are regularly available to those members of the general public needing them."[15] It thus appears that when the modifier "generic" is used within the Act and regulations it refers to an agency or entity providing funds or services to all members of the public needing them. Accordingly, it is determined that a "generic resource" within the meaning of section 4659(d) means funds or services available to all members of the public needing them. Claimant's purely individual legal settlement does not fall within this definition of "generic."

6. The question remains, however, whether the settlement the service agency has mischaracterized as a "generic resource" is nevertheless "a possible source of funding" under section 4659(a)(2), i.e., "Private entities . . . liable for the cost of services, aid, insurance, or medical assistance to the consumer." Once more, the answer to this question is no. While the service agency's Procedure Memo 2301 considers "large settlements ruled to be for the care of the client" as an "available personal resource" that must be tapped before the service

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[11] *Id*., at p. 1106.

[12] *Id*., at p. 1097.

[13] It is noted that, like day care and respite, "special adaptive equipment such as wheel chairs, hospital beds, . . . and other necessary appliances and supplies," the type of services and supports claimant has requested, is listed in section 4685(c)(1) as a separate type of assistance available under the Act. See also, section 4512(b).

[14] Section 4644(b). See also, title 17, California Code of Regulations, section 54302(a)(28).

[15] Title 17, California Code of Regulations, section 54302(a)(29).

agency will expend public funds for services, this policy is not supported by statutory authority. As indicated above, the Lanterman Act is an entitlement act in which services are provided to eligible individuals regardless of their, or their families', financial status.[16] As the service agency itself expressed in Sue Hirch's November 2000 letter to claimant and his mother, "NBRC does not consider an individual's income or personal wealth when making decisions regarding purchases." Nothing in the law permits the service agency to treat claimant's income from his settlement any differently than it would treat income from any other source, such as earned income, an inherited trust fund or income from a legal settlement not designed to compensate claimant for the injuries that resulted in his developmental disability. To paraphrase the *Clemente* court, had the Legislature intended to have the proceeds of legal settlements treated as available resources that had to be utilized by a consumer before a regional center would fund services and supports, it certainly could have done so.

Nor does the Lanterman Act requirement that service agencies provide services and supports in an economical and cost-effective manner[17] detract from the fact that eligible consumers are entitled to the services and supports provided for in the Act without regard to their personal wealth. To be sure, there is a certain tension between the requirement that services and supports be economical and cost-effective and the proposition that entitlement is determined by what is needed to implement a consumer's individual program plan. If it were not for the requirement that services and supports be cost-effective, a consumer would theoretically be entitled to anything that tended to promote the implementation of his or her IPP. But the entitlement provisions must be read in conjunction with the cost-effectiveness requirement. Thus, cost-effectiveness means that the cost of a particular service or support must be measured against the degree to which that service or support will advance the goals of the consumer's IPP. It does not mean, however, that the service agency should seek to limit its own costs by requiring consumers to fund services and supports out of their own resources.

Thus, to the extent the service agency's Procedure Memos 2301 and 2401 purport to make claimant's settlement an "available personal resource," those policies do not comply with the statutory and case law requirement that, except as set forth in specific statutory exceptions, the Lanterman Act is to be implemented without regard to income or personal wealth. The fact that the service agency's procedure memos were approved by the Department of Developmental Services does not insulate them from a finding that they are not in compliance with the law. Claimant's legal settlement is not a resource that must be tapped or exhausted before the service agency must provide necessary services and supports to claimant.

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[16] *Clemente* v. *Amundson*, *supra*, 60 Cal.App.4th at p. 1103.

[17] See, e.g., sections 4646(a), 4651(a), and 4791(c).

Has claimant's settlement been depleted to the point that the service agency must pay for necessary services or equipment?

7. In light of the determination that the settlement is not a resource that must be tapped or exhausted before the service agency will provide necessary services and supports to claimant, this issue is moot. However, if claimant's settlement had been determined to be an available resource, as indicated in Finding 14, above, the current income from the settlement is barely sufficient to meet claimant's needs, leaving no funds available to pay for the services and supports claimant has requested the service agency to fund.

Must the service agency fund the following items requested by claimant: 1) motorized wheelchair repairs or modifications, 2) a new bed and pressure relief mattress, 3) van repairs, 4) a manual wheelchair?

Motorized wheelchair repair or modifications

8. As set forth in Finding 24, above, claimant's motorized wheelchair needs significant modifications in order to provide claimant the proper seating position and to ensure his safety while driving. The only real issues to be worked out are the extent and nature of the modifications and who will provide them. The chair's vendor, Rehab Mobility, stands ready to "make the chair right." But it is quite apparent that at least some of the necessary modifications are not the sort the vendor would be expected to make without charge. In the most important example, it is apparent that the current seating system in the chair—the system Rehab Mobility included in its bid and which was approved by the service agency—is not meeting claimant's needs. Occupational therapist Kathy Leone has recommended a custom antithrust seat with hip guides. A physician at CCS prescribed a custom molded antithrust seat and thigh guides. Mark Hawkins of Western Rehab has recommended a center of gravity seating system. Whether the antithrust seat is the same as the gravity seating system is unclear. What is clear is that claimant needs a new seat. Beyond that, other modifications are also necessary to the chair. Significant among those are modifications/repairs related to the joystick controls and driving safety features. Claimant is entitled to have a wheelchair that he can adequately maneuver and control and that is safe for him to drive.

9. Because a number of experts have made a variety of recommendations concerning modification of the wheelchair, it is impossible to determine without further evidence exactly which of these modifications should be made. It would seem that, at the least, the modifications prescribed by the CCS physician must be made. Which of the other changes recommended by other professionals need be made must be evaluated by the service agency. Whether this should be done by another occupational therapist—one who has not evaluated the chair to this point—or through a consensus of those therapists who have already evaluated the chair—Molinari, Hinsdale, Leone—is left to the service agency's best judgment.

Hospital Bed and Pressure Relief Mattress

10. A physician has prescribed a pressure relief mattress. It should therefore be provided. With the new mattress, claimant also needs a new, larger bed. The parties agree that a hospital bed would be appropriate. Claimant agrees to pay for these items up to the cost of a standard bed and mattress. The service agency shall fund the additional costs of the specialized bed and mattress.

Van Repairs

11. As set forth in Finding 29, above, the repairs claimant is seeks are installation of a new lift, correction of the eyebrow to provide more headroom and repair of the doors so they close properly.

12. For safety reasons, the doors on the van clearly need to be repaired. Since this seems to be related to the installation of the eyebrow, it should be addressed by Access Development. Claimant's requests for reconfiguring the eyebrow and installing a new wheelchair lift have not yet been evaluated and considered by the service agency, which must do so before any modifications or repairs can be funded. The service agency should direct Access Development to repair the door-closing problem on the van and shall evaluate the need for a larger lift and more headroom at the eyebrow, along with any options available to meet such needs.

Manual Wheelchair

13. The service agency views a back-up wheelchair for claimant to be "a convenience" rather than a necessity, the purchase of which would not represent a cost-effective use of public funds. The service agency's position has merit, and its denial of this item is sustained.

As set forth in Legal Conclusion 6, above, the Lanterman Act requires service agencies to provide services and supports in a cost-effective manner. While this does not mean that the service agency should seek to limit its own costs by requiring eligible consumers to fund services and supports out of their own resources, it does mean that a consumer is not entitled to every service and support that might serve to meet his identified needs. Services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities.[18] But consideration must be given to the cost-effectiveness of various means of pursuing that goal. In other words, cost-effectiveness means that the cost of a particular service or support must be measured against the degree to which that service or support will meet the consumer's needs.

[18] Section 4501.

Here, claimant seeks a back-up manual wheelchair to cover such contingencies as when his motorized chair is under repair, or when he wishes to go someplace where access with the motorized chair might be difficult. As to the former, it is hoped that once the necessary modifications are made to claimant's existing chair the need for it to be in the shop for repair will be significantly minimized. As to the latter, this rightly falls more into the category of a convenience than a necessity. Claimant has a motorized chair that can take him most places he needs to go. That there may be some locations to which he will not be able to gain easy access because of the size of that chair is to be regretted. But that is often the unfortunate fact of life for those with disabilities. And the service agency, with its necessarily limited public resources, cannot be expected to make every place accessible to claimant. That is one point where the cost-effectiveness of a service or support must be measured against the degree to which that service or support will enable claimant to approximate the pattern of everyday living available to people without disabilities.

In this case, there are short-term solutions available to claimant when he might need a smaller wheelchair. While it is recognized that claimant has particular seating needs that might not be fully served by a loaner or rental chair, on balance, it is determined that purchasing a back-up wheelchair would not be a cost-effective use of public funds.

ORDER

1. The service agency shall not consider claimant's legal settlement to be a resource that must be tapped or exhausted before services and supports will be provided for him. The service agency shall provide such services and supports without regard to any income claimant receives from the settlement.

2. The service agency shall fund necessary repairs and modifications to claimant's motorized wheelchair. The exact scope and nature of those repairs and modifications shall be made through an evaluation by either an occupational therapist who has not yet evaluated claimant's wheelchair or through a consensus of those therapists who have already done so. In the latter case, the service agency shall arrange some method by which Linda Molinari, Michael Hinsdale and Kathy Leone may jointly consider and come to conclusions about claimant's needs. In any case, the minimum modifications should include those prescribed by a CCS physician in September 2000, as set forth in Finding 23, above.

3. The service agency shall fund a hospital bed and pressure relief mattress for claimant to the extent the cost of those items exceeds the cost of a standard bed and mattress. Claimant shall be responsible for paying those standard costs.

4. The service agency shall fund, or shall cause Access Development to complete at no cost, repairs to the improperly closing doors of claimant's van. The service agency shall timely evaluate the need for a new van lift and for reconfiguration of the eyebrow to

ensure claimant's ability to safely enter and exit the van. The service agency shall fund modifications to the lift and eyebrow to the extent they are found necessary and economically feasible.

5. Claimant's request for funding for a manual wheelchair is denied.

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

DATED: _____

_____
MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings